No. 14,778

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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IDA MAE HERMANN, IRVING E. HERMANN, ROBERT M. SMITH, M. B. SCOTT, HAROLD SHEIN, H. C. RICHARDS, GEORGE PATTERSON, LEONARD ROSEN, ORVILLE KELMAN, and CAPTAIN G. D. THOMPSON,

*Appellants,*

*vs.*

CIVIL AERONAUTICS BOARD,

*Appellee.*

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**Appeal From the United States District Court for the Southern District of California.**

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## BRIEF FOR APPELLEE CIVIL AERONAUTICS BOARD.

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### Jurisdictional Statement.

This is an appeal from an order of the United States District Court for the Southern District of California for the Southern Division, requiring compliance with certain administrative subpoenas issued by the Civil Aeronautics Administration Board. [R. 144.] Jurisdiction is conferred by Section 1291 of Title 28, United States Code.

### Statement of the Case.

This is an appeal from an order of the United States District Court for the Southern District of California, Central Division, requiring compliance with certain ad-

ministrative subpoenas issued by the Civil Aeronautics Board. [R. 144.]

The history of this litigation goes back to October 25, 1949, and the institution of an administrative proceeding, known as Docket No. 4161, in which Great Lakes Airlines, Inc., was charged, *inter alia,* with illegally holding out and operating regular air transportation services in combination with another air carrier through the use of a common agent.[1] Great Lakes was at that time, and is now, owned and controlled by Ida Mae Hermann and Irving E. Hermann, two of the respondents in the current Board proceeding (Docket No. 6908) and appellants herein. [R. 22-23.] The proceeding in Docket No. 4161 terminated in a consent cease-and-desist order, issued on August 28, 1952 (Board Order No. E-6748), which enjoined Great Lakes from combining with any other carrier or ticket agent to hold out or engage in regular air transportation services in contravention of

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[1]Great Lakes Airlines, Inc., is a so-called "large irregular carrier." It does not possess a certificate of public convenience and necessity pursuant to Section 401(a) of the Act (49 U. S. C. 481(a)), but is authorized to engage in irregular and infrequent air transportation only, under an exemption from the certificate requirement of such Section 401(a). This exemption was issued in accordance with Section 416 of the Act (49 U. S. C. 496) and is embodied in Part 291 of the Board's Economic Regulations (14 CFR 291.1, *et seq.*). Section 291.26(b) of the Economic Regulations (14 CFR 291.26(b)) provides "that no large irregular carrier shall make or maintain any agreement, or participate in any arrangement, with or involving any ticket agent or air carrier with respect to the conduct or holding out of air transportation services by such carrier individually or by such carrier in combination, conjunction or collaboration with another air carrier or carriers, where the collective air transportation service so agreed upon or arranged would, if conducted by a single carrier, take it out of the classification of an irregular air carrier as set forth" in said Part 291.

the Civil Aeronautics Act and the Board's Regulations. [R. 20.]

Subsequent informal investigation by members of the Board's staff disclosed that, prior to the issuance of such consent cease-and-desist order, the Hermanns had organized a new and more elaborate combine of irregular air carriers, ticket agency corporations, and other business entities in order to continue, on a larger scale, their illegal air transportation operations. [R. 15-35.]

Under these circumstances, the Board's Office of Compliance instituted the current administrative proceeding, termed Docket No. 6908, against the group of 19 persons and entities who collectively constitute, and operate as, the "Skycoach" air travel system. [R. 14-38.] The issues in the proceeding are summarized in the argument, *infra,* pages 10-11. Reduced to its simplest terms, however, the primary purpose of, and the principal issue in the proceeding, is to determine whether or not two individuals, Ida Mae Hermann and Irving E. Hermann, have unlawfully acquired and maintained control of a number of business entities and have conspired with such business entities to operate a scheduled airline without authority and otherwise to circumvent the provisions of the Civil Aeronautics Act and the Board's regulations.

In the course of this proceeding, the Hearing Examiner issued a number of *subpoena duces tecum,* returnable at the hearing in Los Angeles, and directed to several of the respondents, certain officers or employees of the respondents, and independent auditors and advertising agencies under contract with the respondents. Respondents moved to quash the subpoenas, including those directed to the independent auditors and advertising agencies, on the

grounds that they are burdensome and constitute a general fishing expedition into the affairs of the respondents. After argument, the Hearing Examiner denied the motion. The motion was then referred to the Board and additional argument was presented. Upon full consideration of the objections and argument presented by counsel, the Board issued an order affirming the ruling of the Hearing Examiner (Order No. E-9044, March 25, 1955). [R. 61-67.]

In its order, the Board stated:

> "The subpoenas are not vague and indefinite, or incapable of understanding. Each one specifies the period concerning which documents and records are to be produced where appropriate, and describes the desired materials with particularity. In the light of the charges against the respondents, and particularly those relating to common control and activities constituting air transportation on the part of the non-carrier respondents, it does not appear to us that the subpoenas are excessively broad or unreasonable in scope. . . . They do not constitute fishing expeditions, but rather are requests for material relevant to previously defined charges and issues." [R. 64-66.][2]

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[2]The Board also stated:

> "While certain of the subpoenas request numerous categories of documents and records of the respondents, there is no factual showing of the actual volume of materials involved, or that compliance will be unduly burdensome or oppressive. To the extent that compliance might require the yielding up of books and records necessary for the conduct of day-to-day business, or prove otherwise oppressive, the Examiner upon a proper showing to this effect has ample authority to permit an examination and copying of the materials at the places of business involved, and under conditions which will produce a minimum of interferences with business activities." [R. 65.]

Notwithstanding the rulings by the Hearing Examiner and the Board, the respondents took the position that no subpoenas would be honored except pursuant to an order of the United States District Court for the Southern District of California. [R. 13.][3] Consequently, on March 29, 1955, the Board filed a petition in the court below for an order requiring compliance with such subpoenas. [R. 4-13.] Respondents, appellants herein, filed an affidavit of Ida Mae Hermann in which it is averred that it would be necessary to search through "more than one million documents" in order to locate and produce the documents sought by the subpoenas [R. 109], and that the physical job of collecting these various documents is "staggering." [R. 115.]

On April 7, 1955, the District Court issued an order continuing the cause until April 18, 1955, on condition that the certain of the appellants, including Ida Mae Hermann and Irving E. Hermann, make the records called for by the subpoenas available to representatives of the Board at the places of business of such appellants. [R. 115-116.] At the hearing on April 18, 1955, the Board presented affidavits showing that the appellants had not complied with the court's order and, because of one excuse or another, had failed to make available a great many of the items required by the subpoenas. [R. 117-126.] The Board contended that the inspection of such

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[3]It may be noted, in this connection, that on March 16, 1955, the respondents in Docket No. 6908 filed an injunction action to prevent compliance by four Los Angeles banks with Board subpoenas calling for bank records concerning the respondents' financial affairs. (*Great Lakes Airlines, Inc., et al. v. Ruhlen, et al.*, Civil No. 17957-PH.) A motion for a preliminary injunction in that action was denied by Chief Judge Yankwich on March 17, 1955.

records as were made available did not satisfy its legitimate needs, and that it was entitled to an order enforcing the subpoenas as prayed for in the petition. Such an order was issued by the District Court on April 29, 1955. [R. 126.]

The appellants filed a motion for a rehearing or "new trial," which was argued on May 9, 1955. On May 12, 1955, the court issued a Memorandum for Order [R. 143] in which it denied the motion for rehearing and held:

> "In laying the subpoenas alongside the charges in the Complaint, this Court cannot say that any of the documents or things called for in any of the subpoenas are immaterial or irrelevant to the proceedings before the Board, without an examination of all of the documents and things themselves, which this Court is not called upon to do at this stage of the proceedings."

The court further held that the Board is entitled to an order for the enforcement of the subpoenas as issued, "except that they should be modified to allow a sufficient length of time between dates for the production of the documents called for in subpoena so that the respondents will not be deprived of all their books and records at the same time." [R. 143.] Such an order, from which this appeal was taken, was docketed and entered on May 17, 1955. [R. 144.]

## Statutes Involved.

The provisions of the Civil Aeronautics Act principally involved are set forth in the Appendix hereto (pp. 1-3). Other pertinent provisions of the Civil Aeronautics Act and regulations thereunder are cited or quoted in the text of this brief.

## Summary of Argument.

Section 1004 of the Civil Aeronautics Act (App. pp. 2-3) specifically empowers the Board to issue subpoenas for the "production of *all* books, papers and documents relating to any matter under investigation." (Emphasis supplied.) Administrative subpoenas are valid and enforceable if the documents demanded are "not plainly irrelevant" to any lawful investigation. If such documents meet this test, their volume and extent is immaterial, and it is no defense to the enforcement of the subpoenas that they may be burdensome or cause inconvenience.

It is clear from the record that the documents sought by the Board's subpoenas are not "plainly irrelevant" but directly relate to the previously defined charges and issues in the administrative proceeding. It is also clear that, in view of the nature, purpose, and scope of the inquiry before the Board, the subpoenas are neither excessive nor unreasonable. The issues in the proceeding before the Board are unusually broad. The proceeding is, in essence, a conspiracy case, in that it is charged that two individuals have unlawfully acquired and maintained control of a number of business entities and have conspired with such entities to evade and circumvent the provisions of the Civil Aeronautics Act and to conceal from the Board the true nature of their operations. In order to establish this charge, it is, of course, essential to consider various records and numerous transactions between the respondents so that it may be shown that the respondents have entered into arrangements with each other, have channelled funds from one to another, and have otherwise transacted business with each other in a manner which is inconsistent with business practices of entities dealing at arm's length. Under the circumstances, the subpoenas are proper in all respects and more than meet the requirements long established by many precedents.

## ARGUMENT.

The Board is charged by the Civil Aeronautics Act of 1938, as amended, with the broad responsibility of regulating the air transportation industry (49 U. S. C. 401, *et seq.*). Its investigative powers necessary to carry out such responsibility are correspondingly broad. Section 205(a) of the Act (49 U. S. C. 425 (a)) empowers the Board to conduct such investigations, pursuant to and consistent with the provisions of the Act, as it shall deem necessary to carry out such provisions and to exercise and perform its powers and duties under the Act. Section 415 (49 U. S. C. 495) authorizes the Board, for the purpose of exercising and performing its powers and duties under the Act, "to inquire into the management of the business of any air carrier, and, to the extent reasonably necessary for any such inquiry, to obtain from such carrier, and from any person controlling or controlled by, or under common control with, such air carrier, full and complete reports and other information." Section 1002 (49 U. S. C. 642) empowers the Board, upon complaint of any party or upon its own initiative, to institute investigations "with respect to anything done or omitted to be done by any person in contravention of any provision of this Act, or of any requirement established pursuant thereto."[4]

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[4]As shown hereafter, one of the matters being investigated by the Board in Docket No. 6908 is the alleged existence of control relationship between the various respondents, prohibited by 408(a) of the Act (49 U. S. C. 488 (a)). Section 408 (e) (49 U. S. C. 488(e)) expressly empowers the Board, upon complaint or upon its own initiative, to investigate the existence of such prohibited control relationships. Section 413 (49 U. S. C. 493) provides that "whenever reference is made to control, it is immaterial whether such control is direct or indirect."

To enable it effectively to carry out its investigations, Section 1004 of the Act (49 U. S. C. 644) specifically authorizes the Board to issue subpoenas for the "production of all books, papers, and documents relating to any matter under investigation."[5] The production of such books, papers, and documents may be required from any place in the United States at any designated place of hearing. In case of disobedience to a subpoena, the Board may invoke the aid of any court of the United States in requiring the production of such books, papers, and documents; and any court of the United States within the jurisdiction of which an inquiry is carried on may, in case of refusal to obey a subpoena issued to any person, issue an order requiring such person to appear before the Board as a witness and produce the books, papers, or documents called for by such subpoena.[6]

It is pursuant to these provisions of the Civil Aeronautics Act that the administrative proceeding known as Docket No. 6908 was instituted and that the administrative subpoenas challenged here were issued.

The respondents in Docket No. 6908 are: two irregular air carriers, Great Lakes Airlines and Currey Air Transport; two individuals, Ida Mae Hermann and Irving E. Hermann; a partnership of such individuals engaged in the ownership and leasing of aircraft, Nevada

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[5]See also Section 407(e) (49 U. S. C. 487(c)) which gives the Board access to "all accounts, records, memoranda including all documents, papers, and correspondence" kept by air carriers and their affiliates.

[6]It may also be noted that the refusal to testify or produce books, papers, or documents in obedience to a subpoena of the Board constitutes a misdemeanor and is subject to a fine and imprisonment (Sec. 902(g), 49 U. S. C. 622(g)).

Aero Trades Company; a corporation organized for the purpose of providing gasoline products, Air International, Inc.; a holding company performing banking functions for the various respondents, Great Lakes Airlines Agency, Inc.; and 12 "Skycoach" ticket agency corporations. [R. 15, *et seq.*] The principal charges made by the Board's complaint in Docket No. 6908 [R. 15-35] may be summarized as follows:

1. Ida Mae Hermann and Irving E. Hermann have acquired and maintained control of the other respondents, in violation of Section 408(a) of the Act (49 U. S. C. 488(a)). This has been accomplished and is continuing through nominees or stock ownership, control of property, employees and equipment, leasing of aircraft, control of traffic solicitation and handling, financial management and control, and agreements, arrangements, and understandings of various types. [R. 24-25, 26-27, 32-33.]

2. The two air carriers respondents, Great Lakes Airlines and Currey Air Transport, have made and maintained agreements between themselves and the other respondents through which they have collectively held out and operated regular and frequent air transportation service between designated points, in violation of Section 401 of the Act (49 U. S. C. 481) and Part 291 of the Board's Economic Regulations (14 CFR 291.1, *et seq.*). [R. 19, *et seq.*] The carriers and ticket agents have, on numerous occasions, violated provisions of Parts 291 and 242 of the Economic Regulations of the Board (14

CFR 291.23, *et seq.*, 242.5(b)(4)) with regard to methods of ticketing passengers, the form of tickets used, and agreements between the carriers and the ticket agents. [R. 30-32.]

3. All the violations committed by the respondents were knowing and wilfull. The illegal acts and conduct were deliberately planned and executed for the purpose of evading and circumventing the Act and the regulations promulgated thereunder, and for the purpose of concealing from the Board the true nature of the operation. [R. 34.]

These charges largely determine the issues in Docket No. 6908.

The persons to whom the subpoenas under attack were directed are: Ida Mae Hermann, individually and as secretary-treasurer of Great Lakes Airlines, president of Air International, Inc., and co-partner in Nevada Aero Trades Company [R. 39]; Irving E. Hermann, individually and as president of Great Lakes Airlines Agency, Inc. [R. 43]; Robert M. Smith, individually and as executive vice-president of Currey Air Transport [R. 47]; H. C. Richards, maintenance co-ordinator for Great Lakes Airlines and Currey Air Transport [R. 9, 54]; George Patterson, vice-president of Great Lakes Airlines in charge of maintenance [R. 10, 55]; Captain G. D. Thompson, chief pilot for Great Lakes Airlines and Currey Air Transport [R. 11, 60]; M. B. Scott, president, M. B. Scott, Incorporated, an advertising agency under contract with the respondents [R. 8, 51]; Harold Shein and Orville Kelman, independent auditors

who have performed auditing services for the respondents. [R. 9, 11, 53, 58.][7]

The materials called for by the subpoenas generally fall into the following categories: (1) financial and corporate records of certain of the respondents (including the personal income tax returns of the Hermanns and Robert Smith); (2) correspondence, memoranda, and agreements between the respondents; (3) personnel records of certain of the respondents; (4) data relating to ownership, identification, and utilization of aircraft and assignment of flight personnel; (5) advertising material disseminated to the public by radio, newspapers, display posters, and business cards; (6) airline tickets used by some of the respondents (flight coupons, auditor and agent coupons, and specimen of tickets and exchange orders).

It is clear from the statutory provisions involved that the only limitation on the Board's administrative subpoenas is that the material sought "relates to or touches the matter under investigation." *Cudahy Packing Co. v. N. L. R. B.,* 117 F. 2d 692, 694 (C. A. 10, 1941). And it is established under the cases that administrative subpoenas are valid if the documents demanded are "not plainly irrelevant to any lawful purpose of the agency"; *Endicott Johnson Corp. v. Perkins,* 317 U. S. 501, 509 (1943); or if they appear to be "probably relevant" to a lawful investigation. *Smith v. Porter,* 158 F. 2d 372, 374 (C. A. 9, 1946), cert. den. 331 U. S. 816 (1947); *Hagen*

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[7]A *subpoena duces tecum* was also issued to Leonard Rosen, an employee of one or more of the Skycoach corporations [R. 10, 57.] The court's order, however, requires him to appear *ad testificandum* only. [R. 145.]

*v. Porter,* 156 F. 2d 362, 365 (C. A. 9, 1946), cert. den. 329 U. S. 729 (1946); *Provenzano v. Porter,* 159 F. 2d 47, 48 (C. A. 9, 1947), cert, den. 331 U. S. 816 (1947); *Jackson Packing Co. v. N. L. R. B.,* 204 F. 2d 842, 843 (C. A. 5, 1953). It is also established that if the books and records called for by administrative subpoenas are relevant, their volume and extent is immaterial, and it is no defense to the enforcement of such subpoenas that they may be burdensome or cause inconvenience. *Oklahoma Press Publishing Co. v. Walling,* 327 U. S. 186 (1946); *Westside Ford, Inc. v. United States,* 206 F. 2d 627 (C. A. 9, 1953); *Fleming v. Montgomery Ward,* 114 F. 2d 384 (C. A. 7, 1940); cert. den. 311 U. S. 690 (1940); *McCarry v. S. E. C.,* 147 F. 2d 389, 392 (C. A. 10, 1945).[8]

A comparison of the Board's subpoenas with the administrative complaint demonstrates that the material sought by the Board's subpoenas is not "plainly irrelevant" but directly relates to the issues defined in the administrative proceeding. It is also clear that, in view of the nature, purpose and scope of the inquiry before the Board, the subpoenas are neither excessive nor unreasonable.[9]

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[8]"Petitioners stress that enforcement will subject them to inconvenience, expense and harassment. That argument is answered fully by what was said in *Myers v. Bethlehem Corp.* There is no harassment when the subpoena is issued and enforced according to law."

*Oklahoma Press Publishing Co. v. Walling, supra,* at p. 217.

[9]"Necessarily, as has been said, this cannot be reduced to a formula; for relevancy and adequacy or excess in the breadth of the subpoena are matters variable in relation to the nature, purposes and scope of the inquiry."

*Oklahoma Press Publishing Co. v. Walling, supra,* at p. 209.

The issues in the proceeding before the Board are unusually broad. As already noted, the proceeding is, in essence, a conspiracy case, involving the charge that two individuals have unlawfully acquired and maintained control of a number of business entities and have conspired with such entities to evade and circumvent the provisions of the Civil Aeronautics Act and to conceal from the Board the true nature of their operations. The Board's Office of Compliance is attempting to prove, by competent evidence, that a number of seemingly independent corporate and non-corporate entities, while maintaining a semblance of independence on the surface, are actually operating as cogs in a controlled system, and that the system is being directed by two individuals. The only proof under such circumstances is to show the manner of operation of the entities, what their books and records contain and what their books and records do not contain, and gain a very clear picture of the business and financial inter-relationships between the entities. As found by Chief Judge Yankwich in the case of *Great Lakes Airlines, Inc., et al. v. Ruhlen, et al.* (*supra,* p. 5, note 3), which upheld the propriety of similar subpoenas arising out of the very same proceeding before the Board:

> "One of the objects of the inquiry in the enforcement proceeding above-mentioned is to determine whether or not one or more of the respondents in that proceeding are controlled by certain of the other respondents. The issue is thus whether independent activities are not in truth and in fact a concert of action pursuant to control acquired and exercised in a manner prohibited by the provision of the Civil Aeronautics Act of 1938, as amended. The Court finds that latitude is necessary in the sub-

> poenaing, presentation and reception of evidence in such proceedings to show the interrelations between the respondents in the enforcement proceeding with regard to the exercise of control."

In light of the nature, purpose, and scope of the inquiry before the Board in Docket No. 6908, the subpoenas meet the requirements long established by many precedents. As has been stated, adequacy or excess in the breadth of a subpoena cannot be reduced to a formula. It may be pointed out, however, that subpoenas of similar, if not greater, breadth and scope have been repeatedly enforced by the courts. See, *e. g., Brown v. United States,* 276 U. S. 134 (1927); *Consolidated Rendering Co. v. Vermont,* 207 U. S. 541 (1908); *Oklahoma Press Publishing Co. v. Walling, supra; Hagen v. Porter, supra; Mines and Metals Corp. v. S. E. C.,* 200 F. 2d 317 (C. A. 9, 1952); *Provenzano v. Porter, supra; Westside Ford, Inc. v. United States, supra.*

Appellants contend that the Board, as the proponent of the subpoenas, has not sustained the burden of showing relevance and materiality, because it chose to rely on the specification of issues in the administrative complaint; and that the District Court acted as an "automaton" or "rubber stamp" because it did not require "a stronger and more precise" showing of materiality and relevancy (App. Br. pp. 17, 25, 26). What further proof the District Court should have required of the Board, the appellants do not say. There is certainly no better and, indeed, no other way of establishing that the categories of books and records sought in a subpoena relate to a matter under investigation than to consider them in light of the previously defined purpose, scope, and issues

of such investigation, unless the court should examine each and every one of the documents themselves. That, of course, is the function of the Hearing Examiner in ruling on the admissibility of documents into evidence after they are produced before him pursuant to the subpoena.

Moreover, in petitioning a court for an order to enforce administrative subpoenas, the Board does not occupy the usual position of a moving party to litigation insofar as the burden of proof is concerned. The Board's finding of relevance is entitled to the presumption of correctness; and the burden is on the person who challenges the Board's finding as unlawful to prove that the Board has erred, not on the Board to establish the correctness of its decision. *Kilgore Nat. Bank v. Federal Petroleum Board,* 209 F. 2d 557, 560 (C. A. 5, 1954); *Hagen v. Porter, supra,* at p. 365.[10] The appellants have denied the relevancy of the material sought by the subpoenas, but they have, in no way, rebutted the Board's showing of such relevancy.[11] Consequently, the Board properly relied on its petition, the administrative complaint, and other moving papers, as well as on its carefully considered finding [R. 61-67], *supra,* page 4;

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[10]"It therefore seems clear that the Board's stated finding of relevancy bears at least a *prima facie* stamp of correctness and is not required to be rejected by the court from which the Board must seek enforcement of its subpoena upon the opposition only of a plead denial."

*Kilgore Nat. Bank v. Federal Petroleum Board, supra,* at p. 560.

[11]The extent of the appellants' efforts in this direction are statements by Ida Mae Hermann that "it is difficult to imagine" the relevance of certain data contained in the aircraft maintenance logs, and that "most of the documents sought have no conceivable relation to the issues in the proceeding." [R. 114-155.]

and it was not required to introduce further evidence as to relevancy or make a "stronger and more precise showing", whatever that might be. *Provenzano v. Porter; Smith v. Porter; Kilgore Nat. Bank v. Federal Petroleum Board; Hagen v. Porter,* all *supra.*

It is clear from the record that the books and records sought by the administrative subpoenas directly relate, and are essential, to develop the issues and establish the charges as defined in the administrative complaint. However, under the test established by the Supreme Court and repeatedly followed by this Court, it is sufficient if the books and records are "not plainly irrelevant" or appear to be "probably relevant" to the subject of the inquiry. (See, *supra,* pp. 12-13.) The language in the "Memorandum for Order" [R. 143] shows that the court below, far from acting as an "automaton" or "rubber stamp", very carefully applied this test to the subpoenas involved in this case.[12]

As we have demonstrated, the material sought by the subpoenas is neither excessive nor unreasonable in relation to the issues in Docket No. 6908 as defined in the administrative complaint; and any resulting inconvenience to appellants therefore is no defense to the enforcement of such subpoenas. It should also be noted that the District Court expressly conditioned its enforcement order on the allowance of "a sufficient length of time between dates for the production of the documents called

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[12]It may be noted in passing that *National Labor Relations Board v. Pesante,* 119 Fed. Supp. 444 (S. D., Cal., 1954), which is relied on by appellants (App. Br. p. 27) and in which National Labor Relations Board subpoenas were denied enforcement because of oppressiveness, was decided by the very same judge who decided this case in the court below.

for in subpoena so that the respondents will not be deprived of all their books and records at the same time. [R. 143.] The history of this litigation, moreover, indicates that appellants' claim as to the difficulty of compliance may well be taken with a grain of salt. At the first hearing of this cause before the District Court, the appellants argued, as they argue here, that the physical task of complying with the subpoenas would be "staggering"; and they predicted that months and months would be required to search through "more than one million documents" in order to locate the various documents called for by such subpoenas [R. 107-115, App. Br. pp. 8-13.] However, at the hearing subsequent to the District Court's inspection order of April 7, 1955 [R. 115], they shifted their position. They then contended that many of the records, which would allegedly take months to assemble, were not available to them or did not exist.[13] It further appeared then that the alleged "compliance" by the appellants with the District Court's

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[13]The following are typical of the assertions then made by the appellants:

(a) There is no correspondence between the various respondents in Docket No. 6908 because, although allegedly independent of each other, they were "all out there together and transacted business verbally [R. 119]."

(b) Great Lakes Airlines and Currey Air Transport, the two air carriers involved, do not have "within their possession or control" any copies of carrier tickets or any coupons of such tickets. [R. 120, 132, 140.]

(c) Great Lakes Airlines and Currey Air Transport have no copies of advertising other than telephone directory advertising. [R. 120, 133-134.]

(d) Most of the records of Great Lakes Agency, Inc., allegedly the banking agency for all the respondents in Docket No. 6908 [R. 25], were "either lost or stolen." [R. 131, 119.]

(e) The stock certificates of Currey Air Transport are nowhere to be found. [R. 139.]

order [R. 130, 137] was accomplished with only the intermittent assistance of Robert M. Smith and Ida Mae Hermann, and that the only dire consequence was that Ida Mae Hermann was unable to complete her personal income tax return and had to request an extension of time to file her tax return on April 15, 1955. [R. 136, 141.]

Appellants remaining arguments are likewise without merit. For example, they contend that the Board is not entitled to the enforcement of its subpoenas for the reason that certain of the records were available to the Board pursuant to Section 407(e) of the Act (49 U. S. C. 487(e)), which permits the Board to have access to the properties of air carriers and their affiliates. But the right of the Board to inspect a carrier's records at the carrier's premises, and the right to subpoena the production of records to a designated place of hearing for evidentiary purposes, plainly serve different purposes and are independent of each other. In any event, the history of this litigation, especially the abortive results of the inspection under the district court's order, make it apparent that any attempt to obtain the required books and records on a voluntary basis would have been quite futile.

A similar argument made by the appellants is that the Board is already in possession of "many of the documents" sought by the subpoenas—*i. e.*, "most of the pertinent data contained in the aircraft maintenance logs" of aircraft owned and operated by Great Lakes; "all of the Great Lakes advertising materials called for in the subpoena addressed to Mrs. Hermann;" and the balance sheets and profit and loss statements of Great Lakes

and Currey (App. Br. pp. 15-16). It is true that, by Board regulation, irregular air carriers are required to file certain statistical summaries of data which may be contained in aircraft maintenance logs, copies of all publicity material relating to passenger operations, and balance sheets and profit and loss statements. However, in view of the background of this case and the nature of the charges against Great Lakes and Currey, the Board may well be skeptical of the validity of any documents filed by them voluntarily. Moreover, the subpoena directed to George Patterson calls for the production of the aircraft maintenance logs themselves, rather than any summaries of such logs. [R. 56.] And, according to Mrs. Hermann's affidavit, the only publicity material filed with the Board by Great Lakes consist of copies of telephone directory advertising. [R. 133.][14] Thus, the only documents called for by the subpoenas which may already be in the Board's possession, are copies of telephone directory advertising and balance sheets and profit and loss statements. These documents constitute but a small fraction of the number sought by the subpoenas. Such duplication, if any, is surely no justification for appellants' flat refusal to comply. At most it is a defense to the production of the duplicates in question. This problem can of course be resolved by the Hearing Examiner, and this Court may so provide in its opinion if it feels such action to be appropriate.

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[14]The subpoena addressed to Mrs. Hermann calls for "specimens of all hand cards, brochures, schedules and other advertising material distributed to the public by Great Lakes Airlines, Inc. and/or its ticket agents," and "specimen copies of all newspapers, radio, telephone directory, and magazine advertisements subscribed for by or on behalf of Great Lakes Airlines, Inc." [R. 40-41.]

Finally, appellants object to the production of the personal income tax records of Ida Mae Hermann, Irving E. Hermann, and Robert M. Smith. According to her affidavit, Mrs. Hermann

> "does not wish to have her personal financial affairs revealed in a public hearing and she will be greatly damaged and injured in her personal financial affairs and will be caused extreme embarrassment if these documents are produced. The production of these documents relating to the personal financial affairs of affiant will expose these private financial transactions to the public and will cause affiant extensive financial loss and damage [R. 114]."

Appellants contend that the courts have generally refused to require the production of copies of personal income tax returns under Rule 34 of the Rules of Civil Procecure. Those cases in which the courts have so ruled related only to litigation between private parties and have no application to proceedings before federal regulatory agencies.[15] In such proceedings, the production of copies of personal income tax returns are commonly required. See, *e. g., Smith v. Porter, supra* at p. 373.

The Civil Aeronautics Act, moreover, provides certain safeguards for any person reluctant to produce documents on the ground that they might adversely affect his interests or tend to incriminate him. Section 1104, 49 U. S. C. 674, provides that the Board shall, on the filing of a written objection, order any information contained in the documents withheld from public disclosure when in

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[15]It may be noted that, contrary to counsel's assertion, the weight of authority is that income tax records are available under Rule 34 even as between private parties. See *Mullen v. Mullen*, 14 F. R. D. 142, 143 (D. Alaska, 1953).

its judgment disclosure would adversely affect the interests of such person and is not required in the interest of the public. Section 1005(i), 49 U. S. C. 644(1), provides full immunity from prosecution as to any matter concerning which any such person is compelled to produce evidence despite a plea of self-incrimination.

Appellants also argue, in this connection, that the Board has had ample opportunity to obtain the information contained in such income tax returns pursuant to the district court's inspection order; and that the Board has failed to show that such information cannot be obtained "direct from the witnesses for the asking" (App. Br. pp. 23-24). This argument requires no answer except to point out that the personal income tax records of these individuals were excluded from the District Court's inspection order, and that any attempt to obtain the information "direct from the witnesses for the asking" would have been a useless gesture.

One further point must be noted. The results of the inspection order issued by the Court below make it clear that many of the documents called for in the subpoenas are not available. As an experienced trial Judge, the Court below could not have been unaware of the evidentiary value of a lack, rather than the presence, of documents and memoranda concerning day-to-day business between entities which hold themselves out to be unrelated. In short, there is substantial evidentiary value, under the issues made by the pleadings in the administrative proceedings, in showing exactly what records the various respondents in that proceeding have and do not have. This evidence, particularly in conjunction with the other evidence, might well support a finding of control.

## Conclusion.

For all of the foregoing reasons, it is respectfully submitted that the order of the District Court is in all respects proper and should be affirmed.

Respectfully submitted,

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## APPENDIX.

The pertinent provisions of the Civil Aeronautics Act of 1938, as amended are as follows:

General Powers.

Sec. 205. [52 Stat. 984, 49 U. S. C. 425.] (a) The Authority is empowered to perform such acts, to conduct such investigations, to issue and amend such orders, and to make and amend such general or special rules, regulations, and procedure, pursuant to and consistent with the provisions of this Act, as it shall deem necessary to carry out such provisions and to exercise and perform its powers and duties under this Act.

Complaints to and Investigations by the Authority.

Sec. 1002. [2 Stat. 1018, 49 U. S. C. 642.] (a) Any person may file with the Authority (Board) a complaint in writing with respect to anything done or omitted to be done by any person in contravention of any provisions of this Act, or of any requirement established pursuant thereto. If the person complained against shall not satisfy the complaint and there shall appear to be any reasonable ground for investigating the complaint, it shall be the duty of the Authority (Board) to investigate the matters complained of. Whenever the Authority (Board) is of the opinion that any complaint does not state facts which warrant an investigation or action on its part, it may dismiss such complaint without hearing.

Investigations on Initiative of Authority.

(b) The Authority (Board) is empowered at any time to institute an investigation, on its own initiative, in any case and as to any matter or thing concerning which com-

plaint is authorized to be made to or before the Authority (Board) by any provision of this Act, or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act. The Authority (Board) shall have the same power to proceed with any investigation instituted on its own motion as though it had been appealed to by complaint.

Entry of Orders for Compliance With Act.

(c) If the Authority (Board) finds, after notice and hearing, in any investigation instituted upon complaint or upon its own initiative, that any person has failed to comply with any provision of this Act or any requirement established pursuant thereto, the Authority (Board) shall issue an appropriate order to compel such person to comply therewith.

Evidence.

Sec. 1004. [52 Stat. 1021, 49 U. S. C. 644.] (a) Any member or examiner of the Authority (Board), when duly designated by the Authority (Board) for such purpose, may hold hearings, sign and issue subpenas, administer oaths, examine witnesses, and receive evidence at any place in the United States designated by the Authority (Board). In all cases heard by an examiner or a single member the Authority (Board) shall hear or receive argument on request of either party.

Power to Issue Subpena.

(b) For the purposes of this Act the Authority (Board) shall have the power to require by subpena the attendance and testimony of witnesses and the production of all books, papers, and documents relating to any matter

under investigation. Witnesses summoned before the Authority (Board) shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

Enforcement of Subpena.

(c) The attendance of witnesses, and the production of books, papers, and documents, may be required from any place in the United States, at any designated place of hearing. In case of disobedience to a subpena, the Authority (Board), or any party to a proceeding before the Authority (Board), may invoke the aid of any court of the United States in requiring attendance and testimony of witnesses and the production of such books, papers, and documents under the provisions of this section.

Contempt.

(d) Any court of the United States within the jurisdiction of which an inquiry is carried on may, in case of contumacy or refusal to obey a subpena issued to any person, issue an order requiring such person to appear before the Authority (Board) (and produce books, papers, or documents if so ordered) and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.